

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
OF AMERICA

RICHARD BRIAN WILLIAMS  
Petitioner-Defendant

v.

UNITED STATES OF AMERICA  
Respondent

On Petition for Writ of Certiorari from the  
United States Court of Appeals for the Fifth Circuit.  
Fifth Circuit Case No. 19-60463

---

**PETITION FOR WRIT OF CERTIORARI**

---

**Omodare B. Jupiter** (MB #102054)  
Federal Public Defender  
N. and S. Districts of Mississippi  
200 South Lamar Street, Suite 200-N  
Jackson, Mississippi 39201  
Telephone: 601/948-4284  
Facsimile: 601/948-5510

**Abby Webber Brumley** (MS Bar #101929)  
Assistant Federal Public Defender

Attorney for Defendant-Petitioner

## **QUESTIONS PRESENTED FOR REVIEW**

- 1) Whether sentencing Mr. Williams under the ACCA was error because the prosecutor specifically charged the sentencing provision of 18 U.S.C. § 924(a)(2) in the Indictment, which is not an ACCA sentencing provision.
- 2) Whether sentencing Mr. Williams under the ACCA was error because he did not have three qualifying prior convictions.

## **PARTIES TO THE PROCEEDING**

All parties to this proceeding are named in the caption of the case.

## TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED FOR REVIEW .....	ii
PARTIES TO THE PROCEEDING.....	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES .....	vi
I. OPINIONS BELOW .....	1
II. JURISDICTIONAL STATEMENT.....	2
III. STATUTES INVOLVED.....	3
IV. STATEMENT OF THE CASE .....	4
A. Basis for federal jurisdiction in the court of first instance.....	4
B. Statement of material facts.....	4
V. ARGUMENT .....	6
A. Review on certiorari should be granted in this case .....	6
B. Arguments in support of granting certiorari.....	7
1. Sentencing Mr. Williams under the ACCA was error because the prosecutor specifically charged the sentencing provision of 18 U.S.C. § 924(a)(2) in the Indictment, which is not an ACCA sentencing provision .....	7
2. Sentencing Mr. Williams under the ACCA was error because he did not have three qualifying prior convictions.....	8

VI. CONCLUSION.....	14
CERTIFICATE OF SERVICE .....	15
(Appendices 1, 2 and 3)	

## TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases:</u>	
<i>Johnson v. United States</i> , 559 U.S. 133 (2010).....	6, 10, 11, 12, 13
<i>Stokeling v. United States</i> , 139 S.Ct. 544 (2019).....	10, 12
<i>United States v. Batchelder</i> , 442 U.S. 114 (1979).....	7, 8
<i>United States v. Brewer</i> , 848 F.3d 711 (5th Cir. 2017) .....	11
<i>United States v. Reyes-Contreras</i> , 910 F.3d 169 (5th Cir. 2018) .....	12
<i>United States v. Villegas-Hernandez</i> , 468 F.3d 874 (5th Cir. 2006) .....	11, 12, 13
<u>Statutes:</u>	
Armed Career Criminal Act.....	ii, 4, 5, 6, 7, 8, 9, 10, 13
18 U.S.C. § 16.....	12, 13
18 U.S.C. § 922.....	1, 3, 4, 7
18 U.S.C. § 924.....	ii, 1, 3, 4, 5, 7, 8, 9, 11, 12
18 U.S.C. § 3231 .....	4
28 U.S.C. § 1254.....	2
Miss. Code Ann. § 97-3-73.....	10,11

Tex. Pen. Code Ann. § 1.07 ..... 13

Tex. Pen. Code Ann. § 22.01 ..... 12, 13

Rules:

Rule 10, Supreme Court Rules..... 6

Rule 13.1, Supreme Court Rules..... 2

Rule 29.5, Supreme Court Rules..... 15

United States Sentencing Guidelines:

U.S.S.G. § 2L1.2 ..... 12

## **I. OPINIONS BELOW**

On May 2, 2017, the Grand Jury for the Southern District of Mississippi returned an Indictment charging Mr. Williams with felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The district court case number is 3:17cr64-HTW-LRA. Mr. Williams accepted responsibility for his actions by pleading guilty to the charge.

The district court sentenced Mr. Williams to serve 190 months in prison to run consecutively with any undischarged state court sentence. The court entered a Final Judgment on June 26, 2019. The district court's Final Judgment is attached hereto as Appendix 1.

Mr. Williams filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on June 26, 2019. The Fifth Circuit case number is 19-60463. The Fifth Circuit affirmed the district court's rulings via an Opinion filed on February 27, 2020. The Fifth Circuit filed a Judgment on the same day. The Fifth Circuit's Opinion and Judgment are attached hereto as composite Appendix 2. The Fifth Circuit's Opinion is published at 950 F.3d 328. A copy of the reported rendition of the Opinion is attached hereto as Appendix 3.

## **II. JURISDICTIONAL STATEMENT**

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on February 27, 2020. This Petition for Writ of Certiorari is filed within 150 days after entry of the Fifth Circuit's Judgment as required by Rule 13.1 of the Supreme Court Rules, which was amended by this Court's Covid 19 related Order dated March 19, 2020. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

### **III. STATUTES INVOLVED**

“It shall be unlawful for any person... who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[.]” 18 U.S.C § 922(g)(1).

“Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.” 18 U.S.C. § 924(a)(2).

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[.]

18 U.S.C. § 924(e)(1).

[T]he term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that-- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another[.]

18 U.S.C. § 924(e)(2)(B)(i).

## IV. STATEMENT OF THE CASE

### A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a criminal conviction entered against Mr. Williams for felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charge levied against Mr. Williams arose from the laws of the United States of America.

### B. Statement of material facts.

As described above, Mr. Williams pled guilty to the charge of felon in possession of a firearm. Facts relevant to the issues on appeal pertain to whether Mr. Williams should have been sentenced as an armed career criminal under the Armed Career Criminal Act (“ACCA”).

Through the Presentence Investigation Report (“PSR”), the probation officer opined that Mr. Williams was subject to the sentence enhancing provisions of the ACCA. Classification as an armed career criminal increased his offense level by 11 levels, and subjected him to a 15-year mandatory *minimum* sentence under 18 U.S.C. § 924(e)(1). Without classification as an armed career criminal, the statutory *maximum* sentence would have been 10 years. 18 U.S.C. § 924(a)(2).

The defense objected to Mr. Williams' classification as an armed career criminal through both written objections and at the sentencing hearing. Defense counsel acknowledged that the argument on this issue is against Fifth Circuit precedent, and that the issue was raised in district court to preserve it for appellate review in this Court.

Also, the defense argued that the prosecution was barred from pursuing sentencing under the ACCA because it specifically indicted Mr. Williams under the ten-year statutory maximum sentencing provisions of 18 U.S.C. § 924(a)(2). The district court never made explicit rulings on the defense's objections, but it implicitly overruled them when it ordered the 190-month prison sentence.

## V. ARGUMENT

### **A. Review on certiorari should be granted in this case.**

Rule 10 of the Supreme Court Rules states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion.” For the following reasons, this Court should exercise its discretion to grant certiorari in Mr. Williams’ case.

The first issue before the Court pertains to sentencing a defendant under the ACCA when the indictment does not charge the specific statute calling for sentencing under ACCA. The Court should exercise its discretion to review this issue so that a standard can be adopted to provide notice to defendants that they may be subject to the severe sentencing provisions of the ACCA.

The second issue pertains to defining the phrase “physical force” in the ACCA context. Fifth Circuit case law is at odds with this Court’s requirement in *Johnson v. United States*, 559 U.S. 133 (2010) that the force must be physical in nature, as opposed to mental or emotional force. Granting certiorari will give the Court an opportunity to correct the Fifth Circuit’s misinterpretation of both this Court’s holdings and the language of the ACCA. Correcting this error will save numerous years of unjust imprisonment for both Mr. Williams and other similarly situated defendants in the Fifth Circuit.

## B. Arguments in support of granting certiorari.

### 1. Sentencing Mr. Williams under the ACCA was error because the prosecutor specifically charged the sentencing provision of 18 U.S.C. § 924(a)(2) in the Indictment, which is not an ACCA sentencing provision.

The initial PSR in this case was prepared on August 22, 2017. The defense did not object to any of the content in the initial PSR. The PSR was revised on September 1, 2017. In the revised PSR, the probation officer asserted for the first time that Mr. Williams is subject to the sentencing provisions of the ACCA.

The Indictment against Mr. Williams charges felon in possession of a firearm, in violation of two specific statutes, 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2). Section 924(a)(2) establishes a statutory maximum penalty of 10 years. As stated above, the latest rendition of the PSR states that Mr. Williams should be sentenced for violating statutes 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(e), without superseding the Indictment. Section 924(e), which is a codified provision of the ACCA, sets a statutory minimum sentence of 15 years, with no maximum sentence.

Prosecutors can file charges on all crimes for which the police arrested a suspect, can file charges that are more or less severe than the charges leveled by the police, or can decide not to file any charges at all. This is consistent with the holdings in *United States v. Batchelder*, 442 U.S. 114, 124 (1979), in which this

Court held that “[w]hether to prosecute and what charge to file or bring before the grand jury are decisions that generally rest in the prosecution’s discretion.”

Under *Batchelder*, the prosecutor can choose to narrowly draw an indictment, as it did in this case, to limit its prosecution and the resulting sentence to the ten-year statutory maximum penalty stated in § 924(a)(2). In fact, at the change of plea hearing on July 21, 2017, this Court specifically asked the prosecutor why this case was not a career offender case. The prosecutor informed the court that her office chose not to pursue the case under the ACCA.<sup>1</sup> Because the prosecution chose to specifically indict Mr. Williams under the 10-year statutory maximum sentencing provisions of § 924(a)(2), this Court should grant certiorari, then vacate Mr. Williams’ sentence and remand the case to district court with directions to resentence him without applying the ACCA’s sentence enhancement provisions.

**2. Sentencing Mr. Williams under the ACCA was error because he did not have three qualifying prior convictions.**

Under the ACCA provision stated in 18 U.S.C. § 924(e)(1), a defendant is subject to a 15-year mandatory minimum sentence if he or she “has three previous convictions … for a violent felony or serious drug offense.” It is undisputed that Mr. Williams does not have any prior convictions for serious drug offenses. At issue is whether he has three prior convictions for violent felonies.

---

<sup>1</sup> There may be many good reasons for the prosecutor to make that election such as cooperation or other reasons.

“Violent felony” is defined in § 924(e)(2)(B)(i) and (ii), which states,

the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--  
(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or  
(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

(Emphasis added.)

Through the PSR, the probation officer asserted that Mr. Williams was subject to the ACCA because he has three prior violent felony convictions – two burglary of a dwelling convictions under Mississippi law, and one robbery conviction under Mississippi law. The district court agreed with the probation officer and sentenced Mr. Williams under the ACCA.

The defense concedes that the two prior burglary convictions qualify as violent felonies under the ACCA. At issue is whether the robbery conviction qualifies as an ACCA predicate. Robbery is not an enumerated crime under § 924(e)(2)(B)(ii). So the only possible option under which the prior robbery conviction can be deemed a “violent felony” is § 924(e)(2)(B)(i), which is referred in case law as the “elements clause,” the “physical force clause,” or simply the “force clause.”

As set forth above, a prior conviction is considered a “violent felony” under § 924(e)(2)(B)(i) if it has “as an element the use, attempted use, or threatened use of physical force against the person of another[.]” (Emphasis added). In *Johnson v. United States*, 559 U.S. 133 (2010), this Court defined the level of force required to meet the “physical force” required of § 924(e)(2)(B)(i). “[T]he phrase ‘physical force’ means violent force – that is, force capable of causing physical pain or injury to another person.” *Id.* at 141 (citation omitted). “It plainly refers to force exerted by and through concrete bodies – distinguishing physical force from, for example, intellectual force or emotional force.” *Id.* at 138.

In 2019, this Court again analyzed the force requirement. In *Stokeling v. United States*, 139 S.Ct. 544 (2019), the Court held that a crime satisfies the “physical force” aspect of the elements clause if the force required for a conviction “is sufficient to overcome a victim’s resistance.” *Id.* at 554. But *Stokeling* does not overturn the *Johnson* Court’s ruling that the force at issue must be physical force.

In the context of the *Johnson* and *Stokeling* Courts’ definitions of “physical force,” we must consider whether Mr. Williams’ robbery conviction is a “violent felony” under § 924(e)(2)(B)(i). The first step is to look at the language of the charging statute, which is presumptively § 97-3-73 of the Mississippi Code, titled

“Robbery.”<sup>2</sup> This statute states: “Every person who shall feloniously take the personal property of another, in his presence or from his person and against his will, by violence to his person or by putting such person in fear of some immediate injury to his person, shall be guilty of robbery.” (Emphasis added).

To determine whether Mississippi’s robbery statute is a “violent felony” on the basis that the prohibited conduct involves “physical force,” we look to “the least of the [] acts” enumerated in the statute. *Johnson*, 559 U.S. at 137 (citation omitted). Committing robbery by “putting in fear of some immediate injury” is the “least act” that will satisfy the statutory elements of § 97-3-73.

Putting a person in fear is comparable to inflicting “intellectual force or emotional force” to commit the crime, and *Johnson* clearly holds that this does not meet the definition of “physical force” under § 924(e)(2)(B)(i). *Johnson*, 559 U.S. at 138.<sup>3</sup> For this reason, the district court erred by finding that Mr. Williams is an armed career criminal.

We also look to the “some immediate injury” language of Mississippi robbery statute’s language that a person can be robbed by “putting in fear of some immediate injury.” We are guided by the Fifth Circuit’s rulings in *United States v.*

---

<sup>2</sup> The PSR does not state the statute of conviction. We operate under the assumption that the statute of conviction is § 97-3-73 of the Mississippi Code.

<sup>3</sup> This argument is against Fifth Circuit precedent to the extent that in *United States v. Brewer*, 848 F.3d 711, 715-16 (5th Cir. 2017), the court held that bank robbery by “intimidation” satisfies the physical force clause.

*Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006), *overruled by United States v. Reyes-Contreras*, 910 F.3d 169, 187 (5th Cir. 2018) (*en banc*).<sup>4</sup> The defendant in that case was convicted of illegally reentering the United States after deportation following a state court assault conviction. *Villegas-Hernandez*, 468 F.3d at 876-77. At issue was whether defendant’s assault conviction was an “aggravated felony” under § 2L1.2(b)(1)(C).<sup>5</sup> *Id.* at 877. The district court found that it was, and defendant appealed. *Id.* at 877-78.

Both parties agreed that the applicable subsection of the Texas Misdemeanor assault statute – Texas Penal Code § 22.01 – makes a person guilty of the offense if it is proven that he “intentionally, knowingly, or recklessly causes bodily injury to another[.]” *Villegas-Hernandez*, 468 F.3d at 878. “The government contend[ed] that 22.01(a)(1)’s requirement that a defendant cause bodily injury incorporates a requirement to show the intentional use of force, such that Villegas-Hernandez’s

---

<sup>4</sup> *Villegas-Hernandez* was overruled by *Reyes-Contreras*, which was decided on November 30, 2018. Thus the argument asserted by the defense is against Fifth Circuit precedent. However, the holdings in *Reyes-Contreras* are arguably at odds with this Court’s holdings in *Johnson* and *Stokeling*.

<sup>5</sup> For purposes relevant to the appeal, § 2L1.2’s definition of “aggravated felony” is found in 18 U.S.C. § 16(a)’s definition of “crime of violence.” *See Villegas-Hernandez*, 468 F.3d at 877. Section 16(a) states:

The term “crime of violence” means--

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]

This language is functionally identical to the language of 18 U.S.C. § 924(e)(2)(B)(i) that is at issue in the subject case.

prior assault conviction satisfies 16(a)'s definition of crime of violence." *Id.* at 878-79. This Court disagreed. *Id.* at 879.

The Court held "an assault offense under section 22.01(a)(1) satisfies subsection 16(a)'s definition of a crime of violence only if a conviction for that offense could not be sustained without proof of the use of 'destructive or violent' force." *Villegas-Hernandez*, 468 F.3d at 879. Then, the Court went on to provide examples of how a violation of the assault statute could be committed without using any physical force:

The bodily injury required by section 22.01(a)(1) is "physical pain, illness, or any impairment of physical condition." Tex. Pen. Code Ann. § 1.07(a)(8). Such injury could result from any of a number of acts, without use of "destructive or violent force", making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim. To convict a defendant under any of these scenarios, the government would not need to show the defendant used physical force against the person or property of another. Thus, use of force is not an element of assault under section 22.01(a)(1), and the assault offense does not fit subsection 16(a)'s definition for crime of violence.

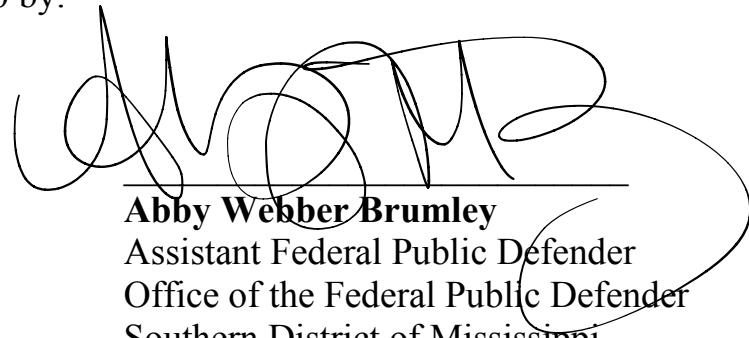
*Villegas-Hernandez*, 468 F.3d at 879.

Just like the example stated in *Villegas-Hernandez*, the "immediate injury" to a victim under Mississippi's robbery statute could be poison. Robbing a person by using a poisonous substance requires no physical force at all. Therefore, under this Court's holdings in *Johnson*, Mr. Williams' robbery conviction does not count as a violent felony under the ACCA. *See* 559 U.S. at 138 and 141.

## VI. CONCLUSION

Based on the arguments presented above, Mr. Williams asks the Court to grant his Petition for Writ of Certiorari in this case.

Submitted July 22, 2020 by:

A handwritten signature in black ink, appearing to read "Abby Webber Brumley", is written over a horizontal line. The signature is fluid and cursive, with a large, stylized 'B' in the middle.

**Abby Webber Brumley**  
Assistant Federal Public Defender  
Office of the Federal Public Defender  
Southern District of Mississippi  
200 South Lamar Street, Suite 200-N  
Jackson, Mississippi 39201  
Telephone: 601/948-4284  
Facsimile: 601/948-5510

Attorney for Defendant-Petitioner